SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 782 26

WEST INDIA OIL COMPANY (PUERTO RICO),
Petitioner,

vs.

RAFAEL SANCHO BONET, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF.

JAMES R. BEVERLEY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, West India Oil Company (Puerto Rico), prays a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in this cause on December 15th, 1939, affirming the judgment of the Supreme Court of Puerto Rico which in turn had reversed the judgment of the District Court of San Juan in favor of petitioner.

The Circuit Court of Appeals affirmed the Supreme Court of Puerto Rico in holding that a sales tax on the sale of foreign fuel oil out of Federally bonded tanks to ships' bunkers in Puerto Rico for use on the high seas is valid, notwithstanding that the oil concerned had not yet been entered through the U. S. Customs and was under the control and

supervision of the United States Customs officers at all times concerned.

Questions Presented.

This petition involves three questions:

1. Whether the sale in New York and delivery within the geographical limits of Puerto Rico to ships' bunkers of foreign fuel oil brought by petitioner to Puerto Rico and stored in Federally bonded tanks under the joint custody of petitioner and the United States Customs officers to await delivery to ships' bunkers, is subject to the tax on sales imposed by Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927.

The Circuit Court of Appeals erroneously assumed in its opinion that the tax involved was "an excise tax based on the privilege of conducting such business". This is incorrect. Business license taxes are provided for in another section of the same taxing act (Section 84 of Act No. 85) which is not in controversy here. The tax here concerned is a straight tax on sales.

2. Whether foreign fuel oil stored in Federally bonded tanks in Puerto Rico to await transfer to ships' bunkers for consumption on the high seas is "exported" within the meaning of the Tariff Act of 1930 (19 U. S. C. A. 1309) and the Revenue Act of 1932 (48 Stat. 256; 26 U. S. C. A., pp. 427-435), and if so, whether such definitions would control in all transactions covering the foreign fuel oil here involved, considering that such fuel oil has never been entered through the United States Customs and remains, while in Puerto Rico, under Customs custody.

3. Whether a Puerto Rico tax on the sale of foreign fuel oil which has never been entered through the Customs, and delivery of which is made in Puerto Rico out of Federally bonded tanks to ships' bunkers for consumption on the high

seas, would constitute a prohibited burden on foreign commerce and on commerce between Puerto Rico and the continental United States.

Summary Statement.

Petitioner is a corporation domestic to Puerto Rico engaged in the handling of petroleum products. So far as the present case is concerned, petitioner brings fuel oil from Aruba, Dutch West Indies, to Puerto Rico and stores it in bonded tanks under Section 555 of the Tariff Act of 1930 (46 Stat. 743, 19 U. S. C. A. 1555). The oil is never entered through the Customs but is either re-exported or is delivered to ships' bunkers for their use on the high seas. Occasionally small amounts are drawn from the bonded tanks for use in Puerto Rico and in such cases this oil is entered through the Customs, the Customs Duty paid and also the Puerto Rican sales tax here involved is paid on such oil. Withdrawal for sale or use in Puerto Rico is negligible (R. 27, 30).

The controversy is as to whether such deliveries of foreign fuel oil out of bonded tanks to ships' bunkers for use on the high seas constitute a transaction taxable under Section 62 of the Internal Revenue Law of Puerto Rico (Act No. 85 of the Legislature of Puerto Rico approved August 20th, 1925 as amended by Act No. 17 approved June 3rd, 1927), which section reads as follows:

> "Section 62. There shall be levied and collected, once only, on the sale of any articles the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale."

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion treats the tax as applied to the fuel oil here involved as an ordinary excise and erroneously assumes that the taxable act takes place within the jurisdiction of Puerto Rico and is protected by the insular laws, overlooking the fact that although the actual delivery of the fuel oil is made from federally bonded tanks to ships' bunkers within the geographical limits of Puerto Rico, the law governing and controlling and protecting the merchandise at all times is exclusively the Federal law. The Custom officers supervise the delivery from the tanks to the ships and the general supervision of these officers continues so far as possible until the oil is actually consumed at sea (R. 31). The contracts for the sale of the oil are made in New York and payments made there (R. 24, 26).

Petitioner's Position.

The tax is not attacked as discriminatory but as being without the power of Puerto Rico to lay.

Petitioner takes the position that the fuel oil involved in this case, never having been entered through the United States Customs, acquired no *situs* for taxation in Puerto Rico and that as a corollary proposition the Insular Government is without authority to tax any transaction such as sale or delivery, moving such fuel oil in commerce. Such merchandise at no time passed through the tariff barriers of the United States and at no time became a part of the mass of property within the territory and thus subject to the territorial jurisdiction for taxing purposes, whether for excise or property taxes. The situation would be different if the fuel oil had ever been entered through the Customs and had become a part of the mass of prop-

erty within the jurisdiction of Puerto Rico. Then it would have become subject to local property taxes or excises, but so far as the present case is concerned, the oil was never within the jurisdiction of Puerto Rico, and the transaction which moved the oil on board the ship is not subject to local taxation.

Petitioner also contends that at all times the fuel oil involved was subject to the provisions of Section 630 of the Revenue Act of 1932 as amended and that this Federal statute having stated that such ship supplies shall be considered as "exports", the local Insular Government of Puerto Rico is also bound to treat these deliveries as exports so long as the supplies never left the control and custody of the Customs officers. A tax on either imports or exports is forbidden to the Insular Government of Puerto Rico by the Act of Congress of March 2, 1917, known as the Organic Act of Puerto Rico (39 Stat. 953, 48 U. S. C. A. 741.)

To allow Puerto Rico to tax the delivery of this foreign oil to ships' bunkers is to permit the Insular Government to frustrate and defeat the declared purpose of Congress in the Revenue Act of 1932 to exempt ships' fuel oil from tax and to thus encourage the fueling of ships in American ports.

Petitioner also takes the position that the application of the insular tax to the fuel oil here involved would constitute in fact a prohibited burden on interstate and foreign commerce and a duty on tonnage.

Reasons Relied Upon for the Allowance of the Writ.

This case involves an important question in regard to the interrelation of a Puerto Rican taxing statute and certain Federal laws, the Tariff Act of 1930 and the Revenue Act of 1932, and the effect of the latter upon the taxing

powers of Puerto Rico, over transactions moving foreign merchandise under Customs Custody. It also involves the important question as to whether a transaction connected with foreign merchandise which has not yet been entered through the Customs and is still under the custody of the Customs officers can be affected by local taxation. The Supreme Court of Puerto Rico held and the Circuit Court of Appeals confirmed that the "sale" takes place where the foreign oil is physically delivered to the ships. Petitioner maintains that under applicable decisions of this Court, the delivery itself, the consummation of the sale, being under the direct control and supervision of the Customs officials, is outside the taxing jurisdiction of Puerto Rico. The decisions have been uniform in the past that foreign merchandise in Customs Custody is outside the jurisdiction of the State or local government powers. The decision below goes contrary to this accepted rule.

The question of whether a tax on a sale of foreign merchandise which technically has never entered Puerto Rico is an interference with and a burden on interstate and foreign commerce, is an important one. If the merchandise itself had never at any time ended its course of importation and come within the jurisdiction of Puerto Rico, then it would seem that a tax on a transaction which moves this foreign merchandise from a Federally bonded tank to the bunkers of ocean-going ships would present an important question of both local and Federal law which has never been clearly answered. The decision of the Supreme Court of Puerto Rico and of the Circuit Court of Appeals for the First Circuit are contrary to the implications of a number of cases of this Court dealing with importation and interstate and foreign commerce and the respective powers of the local and Federal governments over such matters at different moments in the course of the transactions. We

submit that the implications of *Fabbri* v. *Murphy,* 95 U. S. 191; *Low* v. *Austin,* 13 Wall. 29; *Thames etc. Insurance Co.* v. *United States,* 237 U. S. 19; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; *Helson* v. *Kentucky,* 279 U. S. 245 and *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506 are contrary to the holding of the court below.

The case presented here is similar to the case of *McGoldrick* v. *Gulf Oil Corporation,* No. 473 October Term 1939, now pending decision before this Court. On the principles of law involved, the *McGoldrick-Gulf Oil* case we submit cannot be distinguished from the present case.

The definition of "export" applicable to the merchandise here under consideration as given in Section 630 of the Revenue Act of 1932 as amended (26 U. S. C. A., p. 435) and the intent of these acts and of Section 309 of the Tariff Act of 1930 as clearly shown in the Debates and Committee Reports in Congress was to encourage the fueling and supplying of ships in American ports (Senate Report No. 58, 73rd Congress, First Session, May 1st, 1933; Congressional Record, May 11, 1933, p. 3262). The courts below ignored the definitions and intent of these Federal acts which applied to the merchandise here under consideration.

We believe the questions here presented have never been clearly settled by this Court and that they should be settled.

WHEREFORE your petitioner respectfully prays that writ of certiorari be issued under seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding that court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all the proceedings in case numbered and entitled on its docket "No. 3501, October Term 1938, West India Oil Co. (P. R.), Plaintiff-Appellant *v.* Rafael Sancho

Bonet, Treasurer of Puerto Rico, Defendant-Appellee", and that the said decree of the United States Circuit Court of Appeals for the First Circuit may be revised by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem just, and your petitioner will ever pray.

JAMES R. BEVERLEY,
Attorney for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

San Juan, Puerto Rico, February 26, 1940.

JAMES R. BEVERLEY,
Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the insular District Court upholding petitioner's petition is not officially reported. It is printed in the transcript of record at page 15. The opinion of the insular Supreme Court is officially reported in Spanish in 56 D. P. R., p. 732 (Advanced Sheets). It is not yet reported in English but is found in the transcript of record at page 33. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 108 F. (2d) (Advanced Sheets) at page 144.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States as amended by the act of September 13, 1925, 43 Stat. 938. The judgment of the Circuit Court of Appeals for the First Circuit was entered December 15, 1939 (R. 60).

Questions Presented.

The questions presented are stated in the petition filed herein.

Statutes Involved.

The statutes involved in the determination of this case are Section 62 of Act No. 85 of the Legislature of Puerto Rico approved August 20, 1925, as amended by Act No. 17, approved June 3, 1927; Section 555 of the Tariff Act of 1930 (46 Stat. 743), under which the oil tanks were bonded. Also involved are the title and Section 309 of the Tariff Act of 1930 and Sections 601 and 630 of the United States Revenue Act of 1932. All of these statutes are set out in Appendix I.

ARGUMENT.

Point I.

A Puerto Rican sales tax on the "price or value of the daily sales" of all articles sold in Puerto Rico cannot be made effective on the sale of foreign merchandise before it has been entered through the United States Customs and while the merchandise is still under the custody of the United States Customs officers under Section 555 of the Tariff Act of 1930, which custody continues through the delivery to ships' bunkers in the harbors of Puerto Rico.

A. The importation of foreign merchandise is not completed so long as the goods remain in the custody or control of the proper officers of the United States.

This we submit has always been both the executive and the judicial determination. Considering an earlier tariff act, this Court said in *Fabbri* v. *Murphy*, 95 U. S. 191, that Congress did not regard the importation as complete while the goods remained in the custody of the Customs. The Executive branch of the United States Government has always taken the same view. Treasury Dec. 21,158 (1899); 14 Op. A. G. U. S. 574; 21 Id. 233; 27 Id. 440. The same reasoning will hold for the Tariff Act of 1930.

In 17 *Corpus Juris* 552, in discussing customs duties, it is said:

> "With regard to goods in public stores and bonded warehouses it may be said that Congress does not regard their importation as complete while they so remain in the custody of the Customs officials * * *"

In the same volume of *Corpus Juris*, at page 661, it is said in regard to bonded warehouses, such as the ones involved in this suit:

> "The effect of warehousing goods under these provisions is to place them in the possession of the sovereign.

> We know of no cases which have changed this concept of law."

B. An insular sales tax cannot be laid on the sale of foreign articles still in the process of importation and before the articles themselves have become a part of the mass of property in the local taxing jurisdiction.

Such a tax is equivalent to an import duty. It is not necessary to consider the original package doctrine first enunciated in *Brown* v. *Maryland*, 12 Wheat. 419. It is sufficient to point out that here the foreign merchandise had never been entered through the Customs and was still under Customs custody.

Article 942 of the Customs Regulations of 1931 provides that

> "Merchandise in bonded warehouse is not subject to levy, attachment or other process of a state court * * *"

and

> "Imported goods in bonded warehouses are exempt from taxation under the general laws of the several states."

These regulations are continued in the Customs Regulations of 1937 (Act 940). Puerto Rico, as regards the tariff laws and regulations is in the same position as a State (31 Stat. 77; 48 U. S. C. A. 739).

The Secretary of the Treasury on May 18, 1899, ruled on a similar situation as follows (T. D. 21158):

> "The Department is in receipt of your letter of the 8th instant, transmitting an application, addressed to you by the chairman of the finance committee of the board of supervisors of San Francisco, for permission to inspect entries of goods in bond at your port, in order that the goods may be assessed for municipal taxes.
>
> "In reply, I have to state that inasmuch as, under Section 2971 of the Revised Statutes, importers have

a right to withdraw bonded goods for exportation within three years from date of bonding, pending which such goods *have no status as imports for the purposes mentioned,* your action in refusing access to your records for said purpose is proper under article 1166 of the regulations, and meets the approval of the Department." (Italics supplied.)

The case of *Sonneborn Bros* v. *Cureton,* 262 U. S. 506, draws a distinction between imports from foreign countries and interstate commerce as regards immunity from State taxation. It is said in that case that in imports, the immunity attaches to the import itself before sale following the case of *Brown* v. *Maryland, supra,* and the cases based upon that case including *Low* v. *Austin,* 13 Wall. 29 and *May* v. *New Orleans,* 178 U. S. 496. The same rule which prevented a license or occupation tax in *Brown* v. *Maryland,* a property tax in *Low* v. *Austin* and an occupation tax in *Cooke* v. *Pennsylvania,* 97 U. S. 566, would seem to protect imports in Puerto Rico against a local sales tax on their sale before they had passed through the Customs and been released by the officers of the United States. It is difficult to see any distinction in principle between the present case and the ones just cited. Foreign merchandise is treated in all of them, with the added fact that in the present case not only is the foreign fuel oil not entered through the Customs, but it is actually shipped out of the geographical confines of Puerto Rico while under the supervision of the United States Customs.

The statement in the opinion of the Circuit Court of Appeals that the transaction in the present case receives the protection of the insular laws is difficult to follow. Certainly while the foreign fuel oil involved was in the bonded tanks, it was under the exclusive protection of the Federal Government and laws and not under the protection of the insular laws. The contract for sale was made in New York

and hence did not come under the protection of the insular laws. The physical delivery of the oil to the ships out of the bonded tanks in Puerto Rico was certainly made under the exclusive protection of the Federal laws. There is no point at which the Insular Government furnishes any protection either to the transaction which it pretends to tax nor to the merchandise itself. There is thus nothing for which taxation can be "equivalent" as pointed out by "Cooley on Taxation", 4th Edition, Vol. 1, p. 219. The basic reasoning in a case of this kind is shown by Cooley in the same volume at page 222, where he states:

> "The accidental circumstance that it (the state) may have the means of reaching (the person concerned) can make no difference; there must be an interest in the subject matter of the tax; there must be between the state and the taxpayer a reciprocity of duty and obligation * * * "

Point II.

Foreign fuel oil delivered to ships' bunkers under the circumstances in this case for use on the high seas has been defined as "exported" by congressional statute, i. e., the Revenue Act of 1932 (26 U. S. C. A., pp. 427-435). This definition by Congress is controlling on the insular authorities of Puerto Rico so long as the fuel oil involved remains under Customs custody and control.

A. The fuel oil in question is an export so far as the Tariff Act of 1930 and the Revenue Act of 1932 are concerned.

The Tariff Act of 1930 is entitled "An Act to provide revenue, *to regulate commerce with foreign countries,* to encourage the industries of the United States, to protect American labor and for other purposes" (19 U. S. C. A. 1001). (Italics supplied.)

Section 309 of the Tariff Act of 1930 (19 U. S. C. A. 1309) in dealing with the exemption of supplies from duties and taxes says:

> "(a) Articles of foreign or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, be withdrawn from bonded *warehouses* or bonded manufacturing warehouses free of duty or internal revenue tax for supplies (not including equipment) of vessels of war in ports of the United States of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or for supplies (not including equipment) of vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, but no such article shall be landed at any port or place in the United States or in any of its possessions.
>
> "Drawback. (b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter." (46 Stat. 690.) (Italics supplied.)

The Revenue Act of 1932 (48 Stat. 256 found in 26 U. S. C. A. at page 427 ff. in providing a tax on crude petroleum in Section 601(c)4 provides that the tax on the articles in that paragraph *shall apply only with respect to the importation of such articles.* It is also provided in Section 601(b) that with certain exceptions the taxes shall be levied, assessed, collected and paid "*in the same manner as a duty imposed by the Tariff Act of 1930 and shall be treated for the purposes of all provisions of law relating to customs revenue as a duty imposed by such Act.* * * *"

Section 630 of the Revenue Act of 1932 as amended June 16, 1933 (26 U. S. C. A., p. 435) provides as follows:

"Section 630. Exemption from tax of certain supplies for vessels. Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax shall be imposed upon any article sold for use as *fuel supplies,* ship's stores, sea stores or legitimate equipment on * * * vessels * * * actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which a tax has been paid under this title, if laden for use as supplies on such vessels, *shall be held to be exported* for the purposes of Section 601(b)." (Emphasis supplied.)

This section (with the amendments made May 28, 1938, not germane here) is Section 3451 of the United States Internal Revenue Code approved February 10, 1939.

In reporting on the 1933 amendment to the Revenue Act of 1932 the Senate Committee (Senate Report No. 58, 73rd Congress, first session May 1st, 1933) expressed the purpose that Congress had in mind in exempting supplies for vessels.

"Your committee has inserted a new Section 5 providing for exemption from the manufacturers' excise taxes under the Revenue Act of 1932 of articles sold for use as supplies or equipment on vessels of war, vessels employed in the fisheries or whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. It is believed that this amendment will enable American manufacturers to compete more favorably with their foreign competitors for this business without any substantial loss of revenue since *the effect of the present law is to force purchase abroad.* The bill also provides for allowance of drawback on articles manufactured or produced with the use of merchandise on the importation of which tax has been paid under the Revenue Act of 1932, when such articles are laden for use as supplies

on vessels of the classes enumerated. *This also relieves American manufacturers from a competitive disadvantage.*" (Italics supplied.)

The debates on the same section show what was in the minds of the members of Congress (Congressional Record, May 11, 1933, p. 3262).

"Mr. Harrison: There is also a provision that deals with fuel oils and ship's stores and sea stores. It was found that many of the vessels which carry on the foreign trade heretofore had bought their fuel oil in this country, but since the passage of the tax act they have changed their practice and are filling their tanks abroad in the ports of foreign countries, and we are losing that trade. A provision is recommended by the committee that in the case of fuel oil, ship's stores, and so forth, as involved *in this class of foreign trade,* the tax shall not be imposed.

"Mr. Reed: Mr. President, the idea is this: At the present time, *ships* under the American flag or foreign flags, *engaged in the various services mentioned here, all have opportunity to buy their fuel oil at foreign ports, and since we have put a tax on that oil they have all been doing it.*" (Italics supplied.)

It is plain from the Tariff Act of 1930 and the Revenue Act of 1932, that Congress had in mind not only the raising of revenue, but the regulation of interstate and foreign commerce. Congress asserted this in the title to the Tariff Act of 1930, and in the Revenue Act of 1932 references are made to the effect of foreign treaties. Section 601(a). There is no question as to the all inclusive power of Congress over foreign and interstate commerce and it has been expressly held that the power to regulate commerce with foreign nations may be exercised in a taxing act such as the Tariff Act. *Board of Trustees of University of Illinois* v. *United States,* 289 U. S. 48. The drawback provisions have been stated to be for the purpose of building up export trade, encouraging manufactures in this country, etc. See *Tide*

Water Oil Co. v. *United States,* 171 U. S. 210, 216, 43 L. Ed. 139, where it is said:

> "The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

Congress in the exercise of its power over foreign commerce in the Tariff Act of 1930 and the Revenue Act of 1932 evidently had the same purpose in view when it exempted ships' supplies from tax *and defined them as exports.*

B. The definition of "export" as applied to the fuel oil in the present case by the above Federal laws, is binding on the authorities of Puerto Rico.

The fuel oil here concerned never lost its character as an import up to the time it was pumped into ships' bunkers, and thus "exported" within the meaning of the Federal laws governing it. It was exclusively under the control of the Federal laws at all times. Until it should lose its character as an import and should become mixed with the general mass of property within the territory of Puerto Rico, the provisions of the Revenue Act of 1932 and the related Tariff Act of 1930 and the definitions therein would necessarily control as to insular authorities. The Congress of the United States under its constitutional powers over commerce was within its rights in defining foreign fuel oil laden on ships under the conditions in this case as an "export". Puerto Rico being under the absolute jurisdiction of Congress would be bound by such definition until the oil was released from Customs custody. Otherwise, the Insular Government could interfere with and annul the expressed intention of Congress.

The purpose of defining such fuel oil as "exports" is shown in the Committee Report of the Senate and in the remarks of Senators Harrison and Reed, *supra*, pages 15-16.

It was the plain intention of Congress that ships' supplies including fuel oil should not be taxed, in order that American suppliers might compete with foreign suppliers. Congress determined that the word "export" in reference to ships' supplies should be given its ordinary or primary definition rather than its technical definition (*United States* v. *Chavez*, 228 U. S. 525) and the Insular Government of Puerto Rico would have no power through the application of a taxing statute to overthrow the intent of Congress in regard to the treatment of ships' supplies. The insular laws could not apply to the fuel oil here involved at any point of time since it was never within the jurisdiction of Puerto Rico.

C. A tax on the sale would be no different in fact and in effect from a tax on the merchandise itself.

The *McGoldrick* cases decided by this Court January 29th, 1940, do not decide the present case. In the *McGoldrick* cases, the goods were domestic to the United States and admittedly delivered within the jurisdiction of the City of New York. In the present case the merchandise is foreign and had never completed its importation before it was pumped into the ships' bunkers. The present case is more similar to that of *McGoldrick* v. *Gulf Oil Corporation*, No. 473, now pending before this Court.

The fuel oil concerned in the *Gulf Oil Corporation* case was also foreign oil landed in bond and subsequently transferred to ships' bunkers for use on the high seas. The oil in the *Gulf* case was processed in bond, while the oil in the present case underwent no processing. The processing or non-processing would not affect the legal situation. If the Gulf Oil Corporation prevails in its case, the petitioner must prevail in the present case.

Merchandise in the course of importation and while in Customs custody would be exempt from a local property tax. It would seem difficult to justify an excise on some transaction moving such foreign merchandise, since this would be to allow by indirection what could not be done directly. *Thames, etc.* v. *United States,* 237 U. S. 19; *Helson* v. *Kentucky,* 279 U. S. 245; *Philadelphia, etc., Steamship Co.* v. *Pennsylvania,* 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Clyde Mallory Line* v. *Alabama,* 296 U. S. 261.

Any local tax which in fact taxes foreign commerce, or as in this case the oil used in propelling ships in interstate and foreign commerce, is invalid if its necessary effect is to lay a burden on such commerce. Cooley on Taxation, 4th Ed., Vol. 1, p. 809. The practical effect of the tax involved in the present case is to place an excise on the use of the fuel oil in propelling ships on the high seas in foreign commerce and in commerce between Puerto Rico and the continent.

Point III.

The fuel oil involved in this case never left the channels of foreign commerce in contemplation of law and no transaction connected therewith is taxable.

A. The idea that the sale of the fuel oil here involved is taxable because physical delivery (consummation of the sale) was made within the *geographical limits* of Puerto Rico, is invalid. The petitioner received no protection from the insular laws in anything connected with the sale or delivery of the oil. The contracts of sale were entered into in New York and the invoices made there and payment made there. These contracts were protected by the laws of New York; and the fuel oil under Customs custody and the delivery thereof, under the supervision of the Customs officers, to the ships, was protected exclusively by the laws of the United States. As between Puerto Rico and peti-

tioner, there was at no time any reciprocity of duty or obligation in connection with this oil or the sale thereof, which previously has always been thought necessary as a basis for a tax.

The Supreme Court of Puerto Rico apparently assumed that at the very instant when the oil was flowing through the pipelines to ships, it came within the jurisdiction of Puerto Rico. But as pointed out before, at this time the oil was still under Customs supervision since it was foreign oil, the importation of which had never been completed.

B. Any taxes imposed on imports while they are in Customs custody are import duties. *Stone & Downer Co.* v. *United States,* 19 C. C. P. A. (Customs 259); *Marshall Field & Co.* v. *United States,* Treasury Decisions 47,877; *Anglo-Chilean Corporation* v. *Alabama,* 288 U. S. 218, 226; *Fabbri* v. *Murphy, supra.*

This principle would apply as well to an excise tax on transactions connected with such goods as to a property tax on the goods themselves.

C. The course of the oil involved in this suit is from Aruba, Dutch West Indies, direct to a Federally bonded warehouse (tank), thence under the supervision of the United States Customs officers to the bunkers of ships for consumption on the high seas in journeys from Puerto Rico to foreign countries and to ports of the continental United States. The facts compel the conclusion that the oil was at all times still in the channels of foreign commerce. *Carson Petroleum Co.* v. *Vial, supra; Railway Co.* v. *Sabine Tram Co.,* 227 U. S. 111; U. S. Customs Regulations of 1931, Section 942, *supra; Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 at p. 292. *Bingaman* v. *Golden Eagle Lines,* 297 U. S. 626.

The present tax cannot be justified as a use tax, *Helson* v. *Kentucky, supra,* and in any event the use takes place out-

side Puerto Rico. The contract of sale cannot be taxed, as it took place in New York. The only thing left is a delivery. But this delivery of the oil takes place under the control of the United States Customs officers. No taxable act takes place within the jurisdiction of the Insular Government.

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583 the tax was upon use. Mr. Justice Cardozo observed:

> "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

Here the converse is true. The tax is upon sale (or delivery) but upon a sale so closely connected with the use in foreign and other commerce as to be open to the same objections as if the tax had been laid directly upon the use of the oil by the vessels at sea.

D. The interstate or foreign character of the merchandise is not affected by the right of diversion to a local destination. *Dahnke-Walker Milling Co.* v. *Bondurant, supra.* Neither does the fact that smaller quantities may be taken out for local delivery affect the character of the remaining merchandise. *Eureka Pipeline* v. *Hallanan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 493, where it is pointed out:

> "But in making such internal regulations a State cannot impose taxes * * * upon property imported into the State from abroad * * * and not yet become part of the common mass of property therein. * * *"

Also in *Railway Co.* v. *Sims,* 191 U. S. 441, 449:

> "* * * we have uniformly held that states have no power to tax * * * goods imported from foreign countries * * * before they have become commingled with the general property of the state and lost their distinctive character as imports."

The fuel oil concerned in this case certainly never became a part of the general mass of property within Puerto Rico and a tax on it or on a transaction connected with it is void upon the precedents cited.

Conclusion.

It is respectfully submitted that the foreign fuel oil involved in this case was never at any time within the jurisdiction of Puerto Rico and had never at any time finished its importation and become incorporated into the general mass of property in the Island and as such a delivery of such fuel oil within the geographical limits of Puerto Rico would not be subject to a sales tax under Section 62 of the insular Internal Revenue Act. It is further submitted that the deliveries took place outside the jurisdiction of Puerto Rico, and under the control and custody of the United States Customs officers and no insular tax could be levied on such deliveries.

It is further submitted that the oil in this case was exported within the meaning of the United States laws controlling the oil at all times, and a Puerto Rican tax on such export is invalid. If the tax attempted to be levied in this case should be made effective, it would constitute in substance a burden upon foreign commerce and a tax upon merchandise still in the course of foreign commerce, and would permit the Government of Puerto Rico to hinder and frustrate the declared purposes of Congress as expressed in the Tariff Act of 1930 and the Revenue Act of 1932.

The judgment of the United States Circuit Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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Attorney for Petitioner,
West India Oil Company (Puerto Rico).

APPENDIX I.

CONSTITUTION:

Article IV, Section 3, Clause 2:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

The Organic Act for Puerto Rico, Act of March 2, 1917, c. 145, 39 Stat. 951:

(Sec. 1) That the provisions of this Act shall apply to the Island of Porto Rico and to the adjacent islands belonging to the United States, and waters of those islands; * * *

Sec. 3. (As amended by Act of Congress, approved March 4, 1927.) That no export duties shall be levied or collected on exports from Porto Rico, but taxes and assessments on property, income taxes, internal revenue, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico; * * *

Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 690, 743, Secs. 309, 555, 556, Titles III and IV; 19 U. S. Code, Pars. 1309, 1555 and 1556:

Sec. 309. Supplies for certain vessels—Exemption from customs duties and internal-revenue tax.

(a) *Articles of foreign* or domestic manufacture or production may, under such regulations as the Secretary of the Treasury may prescribe, *be withdrawn from bonded warehouses* or bonded manufacturing warehouses *free of duty or internal-revenue tax* for supplies (not including equipment) of vessels of war, in ports of the United States, of any nation which may reciprocate such privilege toward the vessels of war of the United States in its ports, or *for supplies* (not including equipment) *of vessels of the United States employed* in the fisheries or in the whaling business,

or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or *between the United States and any of its possessions,* but no such article shall be landed at any port or place in the United States or in any of its possessions. (Italics supplied.)

Drawback.

(b) Articles of domestic manufacture or production laden as supplies upon any such vessel shall be considered to be exported within the meaning of the drawback provisions of this chapter. (June 17, 1930, c. 497, Title III, Sec. 309, 46 Stat. 690.)

Sec. 555. Bonded Warehouses.

Buildings, or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this Act, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the

officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the Proprietor of such warehouse.

Sec. 556. Same—Regulations for Establishing.—The Secretary of the Treasury shall from time to time establish such rules and regulations as may be necessary for the establishment of bonded warehouses and to protect the interests of the Government in the conduct, management, and operation of such warehouses and in the withdrawal of and accounting of merchandise deposited therein.

Revenue Act of 1932; June 6, 1932; c. 209 Sections 601 (a); 601 (c) 4; 601 (b) 5; 630 (as amended June 16, 1933, c. 96, Sec. 5, 48 Stat. 255); U. S. Internal Revenue Code Sections 3420, 3422, 3430, 3451; 47 Stat. 259, 260:

Part I. Special Provisions.

Sec. 3420. Imposition of tax.—In addition to any other tax or duty imposed by law, there shall be imposed upon the following articles imported into the United States unless treaty provisions of the United States otherwise provide a tax at the rates specified in sections 3422 to 3425, inclusive.

Sec. 3422. Petroleum and derivatives.—Crude petroleum, ½ cent per gallon; fuel oil derived from petroleum, gas oil derived from petroleum, and all liquid derivatives of crude petroleum, except lubricating oil and gasoline or other motor fuel, ½ cent per gallon; gasoline or other motor fuel, 2½ cents per gallon; lubricating oil, 4 cents per gallon; paraffin and other petroleum wax products, 1 cent per pound. The tax on the articles described in this section shall apply only with respect to the importation of such articles.

Sec. 3430. Applicability of tariff provisions.—The tax imposed by section 3420 shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, 46 Stat. 590, 672 (U. S. C. Title 19, c. 4)

and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that * * * and for the purposes of taxes under section 3422 to 3425, inclusive, the term "United States" includes Puerto Rico.

Sec. 3451. Exemption from tax of certain supplies for vessels.—Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this chapter, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 3430.

Puerto Rico: Internal Revenue Law of Puerto Rico, as amended by Act No. 17 of June 3, 1927; Laws of 1927, Special Session, pp. 458-486.

Sec. 62.—There shall be levied and collected, once only, on the sale of any article the object of commerce, not taxed under Section 16 of this Act or exempted from taxation as provided in Section 83 of the same, and at the time of sale in Porto Rico, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sale (pp. 472-474).